IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EVE ATKINSON,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	No. 01-CV-2141
v.	:	
	:	
LAFAYETTE COLLEGE and	:	
ARTHUR J. ROTHKOPF, ESQUIRE,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J. January 29, 2002

Plaintiff Eve Atkinson ("Plaintiff") brings this action against Lafayette College ("the College") and its President, Arthur J. Rothkopf ("Rothkopf") (together, "Defendants"), alleging unlawful employment discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. ("Title IX") and the Pennsylvania Human Rights Act, 43 P.S. § 951, et seq. ("PHRA"), as well as breach of contract. Plaintiff seeks "declaratory, injunctive, monetary and other appropriate relief." Presently before the Court is Defendants' Motion for Partial Dismissal pursuant to Rule 12(b)(6). For the reasons stated below, Defendants' Motion is **GRANTED** in part and **DENIED** in part.

I. FACTS

According to the complaint, Plaintiff was appointed by the College as "Director of Athletics and Professor and Department Head of Physical Education and Athletics" on December 28, 1989. Plaintiff's appointment was for an initial term ending June 30, 1992, after which she became a tenured member of the faculty at the College. In January 1996, Plaintiff began raising issues of gender equality in the context of the College's athletic budget by submitting various plans to ensure compliance with Title IX to a committee of the College's Board of Trustees.[1] Plaintiff alleges, inter alia, that on November 18, 1998, as a direct result of the tensions raised by public discussion and debate of these issues, she was physically threatened by the College's Dean of Students. Plaintiff further alleges, inter alia, that on November 4, 1999, she was notified by Rothkopf that her employment with the College would be terminated on June 30, 2001. Plaintiff alleges her termination was based on her gender and in retaliation for her insistence that the College comply with Title IX. Plaintiff also alleges that her termination, as well as the College's failure to provide her with the opportunity to be heard on the matter, violated her contractual rights as a tenured professor at the College.

II. LEGAL STANDARD

Under Fed. R. Civ. P. 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert.denied, 501 U.S. 1222 (1991). To prevail, the movant must show "beyond doubt

[1] As set out in detailinfra , Title IX prohibits discrimination "on the basis of sex" under "any education program or activity" at any institution that receives federal financial assistance, such as the College. See 20 U.S.C. § 1681.

that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, (1957). In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the court must only consider those facts alleged in the complaint. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

A. Count I - Sex Discrimination and Retaliation Under Title VII

Count I of the complaint alleges a claim for sex discrimination and retaliation under Title VII. Defendants argue that Count I must be dismissed against the College for failure to exhaust her administrative remedies because (1) she initiated this suit before receipt of a right-to-sue notice from the Equal Employment Opportunity Commission ("EEOC") and (2) her claim of retaliation and certain factual claims of sex discrimination were not within scope of her EEOC complaint.[2]

[2] Defendants also seek dismissal of Count I as applied to Rothkopf because, they allege, he may not be held individually liable for Title VII violations. Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996)(en banc), cert. denied, 521 U.S. 1129 (1997). Plaintiff states that she does not oppose such dismissal. As a result, the Court dismisses Count I against Rothkopf.

In support of their Motion, Defendants attach: (1) Plaintiff's administrative complaint, (2) her letter from her attorney forwarding the administrative complaint, (3) her right-to-sue letter, and (4) her employment contract. Defendants urge the Court to consider these materials on this Motion to Dismiss, since a court may properly consider any "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994).

1. EEOC Right-to-Sue Notice

A plaintiff under Title VII must file a timely charge with the EEOC before initiating suit in federal court. Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1210 (3d Cir. 1984). In addition, a plaintiff may not bring suit without having first received a right-to-sue notice. Burgh v. Borough Council of Montrose, 251 F.3d 465, 470 (3d Cir. 2001). Receipt of the right-to-sue notice indicates that a complainant has exhausted administrative remedies. Id. Plaintiff must exhaust the administrative scheme of Title VII because it was "designed to correct discrimination through administrative conciliation and persuasion if possible, rather than by formal court action." Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977). For this reason, "the aggrieved person is not permitted to bypass the administrative process." Id. However, as the duty to exhaust administrative remedies is not jurisdictional in nature, it is subject to waiver, estoppel and equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

In this case, the right-to-sue letter was not issued to Plaintiff until May 7, 2001, five days after the complaint was filed on May 1. However, EEOC administrative remedies may

be considered fulfilled when a right-to-sue letter is issued before trial. See, e.g., Lozada v. Reading Hosp. & Med. Ctr., Civ. No. 00-4081, 2001 WL 438418 at *2 (E.D. Pa. Apr. 27, 2001); Page v. ECC Management Servs., Civ. No. 97-2654, 1997 WL 762789 (E.D. Pa. Dec. 8, 1997) at *3 (citing Molthan v. Temple Univ., 778 F.2d 955, 960 (3d Cir. 1985)); Lantz v. Hospital of the Univ. of Pennsylvania, Civ. No. 96-2671, 1996 WL 442795 (E.D. Pa. July 30, 1996)(same). Furthermore, there is no record in this case of Plaintiff's wholesale failure to obtain such a letter or to make any attempt to do so, which mark the cases cited by Defendants. See, e.g., Dollinger v. State Ins. Fund, 44 F. Supp.2d 467, 474 (N.D.N.Y. 1999); Styles v. Philadelphia Elec. Co., Civ. No., 93-4593, 1994 WL 245469 (E.D. Pa. June 6, 1994). As a result, Defendants' Motion is denied on this point.

2. Scope of the EEOC Complaint

The scope of any ensuing federal court action is generally defined by that of the EEOC charge. However, when a claim is not specifically presented to the EEOC, the test for whether that claim can be presented to the district court is "whether the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996) (citing Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984)).

On the relevant record before the Court, consisting solely of the administrative charge and the complaint filed in this Court, Defendants fail to meet their burden of demonstrating that Plaintiff "can prove no set of facts in support of [her] claim which would entitle [her] to relief." Conley, 355 U.S. at 45-46. Furthermore, the principal cases upon which Defendants rely dismissed claims on motions for *summary judgment*. See, e.g., Watson v.

SEPTA, Civ. No. 96-1002, 1997 WL 560181 (E.D. Pa. Aug. 28, 1997); Fakete v. Aetna, Inc., Civ. No. 00-1391, 2001 WL 541086 (E.D. Pa. May 14, 2001). Therefore, Defendants' Motion is denied on this issue. The Court will consider exhaustion arguments regarding the scope of the administrative charge and subsequent investigation at the summary judgment stage.

Therefore, Defendants' Motion is denied as to Count I of the complaint against the College. As explained in note 2 supra, Defendants' Motion is granted as to Count I of the complaint against Rothkopf.

B. Count II - Sex Discrimination and Retaliation Under the PHRA

Defendants argue that Count II must be dismissed for failure to exhaust her administrative remedies because (1) Plaintiff initiated this suit before waiting one year from when she filed her administrative complaint; (2) Plaintiff failed to plead Rothkopf's liability under the PHRA with particularity; and (3) both her claims of retaliation and certain factual claims of sex discrimination were not within the scope of her administrative complaint.

1. PHRA One-Year Waiting Period

Pennsylvania law requires that a plaintiff exhaust her administrative remedies under the PHRA before maintaining a civil suit under that act. 43 P.S. § 962(c). See Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir.), cert. denied, 552 U.S. 914 (1997). The PHRA also reflects a legislative intent "to make administrative procedures under the PHRA a mandatory rather than discretionary means of enforcing the rights created thereby." Clay v. Advanced Computer Applications, 552 Pa. 86, 90, 559 A.2d 917, 919 (1989). A plaintiff must exhaust her remedies by waiting one year after the filing of an administrative complaint to seek redress in court. See 43 P.S. § 962(c). The PHRA also allows that "[t]he time limits for filing under any

complaint or other pleading under this act shall be subject to waiver, estoppel and equitable tolling." 43 P.S. § 962(e).

In this case, Plaintiff filed suit on May 1, 2001, *one day* before the required one-year period would have elapsed on May 2. Defendants claim that this should bar these claims in this lawsuit, since Plaintiff has failed to exhaust her administrative remedies. However, courts have declined to dismiss lawsuits when the one-year period elapses during litigation, instead of dismissing the claim on a technical defect that has since been cured. See, e.g., Troendle v. Yellow Freight, Inc., Civ. No. 97-2430, 1999 WL 89747 at *7 (E.D. Pa. Feb. 2, 1999); Violanti v. Emery Worldwide A-CF Co., 847 F. Supp. 1251, 1257-1258 (M.D. Pa. 1994). Unlike the cases Defendants urge the Court to follow, Plaintiff has not demonstrated lack of a good faith use of the PHRA administrative procedures by, for example, filing her lawsuit *months* before the one-year period elapsed, or not filing an administrative complaint at all. As a result, Defendants' Motion is denied on this issue.

2. Rothkopf's Liability Under the PHRA

The core PHRA provision, § 5(a), establishes liability solely for employers. Dici v. Pennsylvania, 91 F.3d 542, 552 (3d. Cir 1996). See 43 P.S. § 955(a). However, a separate section of the PHRA, § 5(e), also makes it unlawful for an *employee* to aid or abet any practices the statute deems unlawful. See 43 P.S. § 955(e). Furthermore, the PHRA requires that the allegations set forth in an administrative complaint must be pled with particularity. See 43 P.S. § 959(a).

Plaintiff's administrative complaint in this case stated that both the College and Rothkopf violated § 5 of the PHRA, and then set forth specific factual allegations. Defendants

contend that, in light of the statutory requirement to set forth the particulars of the claim, because the administrative complaint did not specifically reference § 5(e) or contain such words as "aiding and abetting," Plaintiff has not exhausted her administrative remedies against Rothkopf. This allegation fails. Plaintiff named both Rothkopf and the College in the administrative complaint, invoked § 5 of the PHRA (which includes a provision providing for employee liability) and then set forth specific factual allegations against both Defendants, including at least one specific action taken by Rothkopf: notifying Plaintiff of her termination. That the complaint is devoid of the specific "aiding and abetting" language or a specific reference to § 5(e) does not mean that the factual allegations were not pled with sufficient particularity.

The cases Defendants cite in support of this argument are inapposite, as the administrative charges in those cases were completely devoid of specific factual allegations of discrimination and did not even identify a particular plaintiff. See Murphy v. Commonwealth, 506 Pa. 549, 553, 486 A.2d 388, 390 (1985); PHRC v. U.S. Steel Corp., 458 Pa. 559, 562-563, 325 A.2d 910, 912 (1974). Defendants' Motion is denied on this issue.

3. Scope of the PHRA Complaint

Defendants rely upon the same arguments advanced in section III. A. 2., supra, concerning Plaintiff's EEOC charge as to why Plaintiff's claims of retaliation and certain factual claims of sex discrimination must be dismissed because they are beyond the scope of her administrative complaint. For the same reason as set forth above, Defendants do not meet their burden on a Motion to Dismiss. Again, the Court will consider exhaustion arguments regarding the scope of the administrative charge and subsequent administrative investigation at the summary judgment stage.

As a result, Defendants' Motion is denied as to Count II of the complaint.

C. Count III - Retaliation Under Title IX

Count III of the complaint alleges that Defendants retaliated against Plaintiff in violation of Title IX. Defendants argue that Count III must be dismissed against the College because there is no private cause of action to enforce a claim of Title IX retaliation under the U.S. Supreme Court's recent ruling in Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511 (2001).[3] In Sandoval, the Supreme Court held that no private right of action exists to enforce a regulation enacted under Title VI of the Civil Rights Act of 1964 ("Title VI") that prohibits activity which has a discriminatory disparate impact upon protected groups. Therefore, due to the similarities between Title IX and Title VI and the regulations promulgated thereunder as described infra, this Court begins its analysis with an examination of Sandoval.

Title VI, the focus of the Court in Sandoval, contains a rights-creating provision, § 601, that states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered. 42 U.S.C. § 2000d. Title VI also contains, at § 602, an authorizing provision that states that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity ... is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability...." 42 U.S.C. § 2000d-1. Pursuant to § 602, the Department of Justice issued regulations that

[3] Like Count I, Defendants also seek dismissal of Count III of the complaint as applied to Rothkopf because (in addition to the above arguments advanced to dismiss Count III) they contend he may not be held individually liable for Title IX violations. Plaintiff states that she does not oppose such dismissal. As a result, the Court dismisses Count III against Rothkopf on this basis.

prohibited disparate impact discrimination. The plaintiffs in Sandoval, a class of non-English speakers, asserted a claim for disparate impact discrimination under these regulations because the State of Alabama offered its drivers' licensing examination only in English.

In Sandoval, the Supreme Court noted at the outset that it would take as given three important points that shaped its analytical framework. First, it acknowledged that under Cannon v. University of Chicago, 441 U.S. 677 (1979), a private right of action is available to enforce the rights contained in *§ 601* of Title VI.[4] The Supreme Court stated that it was "beyond dispute" that private individuals can sue to enforce § 601's prohibition on discrimination. Sandoval, 121 S. Ct. at 1516. Second, the Supreme Court held that it was similarly beyond dispute that § 601 of Title VI prohibits only *intentional* discrimination, as opposed to disparate impact discrimination proscribed by the regulations under § 602. Id. Third, for the purposes of deciding the case, the Supreme Court assumed that the disparate impact regulations promulgated under § 602 are valid, even though they go beyond § 601 by proscribing activity that is "permissible" under the statute.[5] Id. at 1517.

In Sandoval, the Supreme Court held that there was no private right of action to enforce the disparate impact regulations issued under § 602 – unlike the rights created in § 601 – because there was no evidence of congressional intent to create such a private right in the *statute itself*. Id. at 1519. At the crux of the Supreme Court's analysis was its teaching that:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by

[4] Cannon actually concerned the enforcement of Title IX's § 901, which, as described infra, is that statute's rights-creating provision, prohibiting discrimination "on the basis of sex." 20 U.S.C. § 1681. Due to the parallels between the two statutes, however, the Court held that Cannon was equally applicable to Title VI.

[5] This Court makes a similar assumption for purposes of this analysis. See infra note 6.

> Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Id. at 1519-1520 (citations omitted). As a result, the Supreme Court found that it was proper to both begin and end its analysis with the text and structure of Title VI itself (specifically § 602, since the conduct prohibited by regulation was permissible under § 601) as opposed to the regulations issued thereunder. Id. at 1520.

The Supreme Court then examined § 602's text and structure, searching for evidence of congressional intent to create the private right of action asserted by the plaintiffs. It recognized the absence of any rights-creating language, such as found in § 601. Therefore, it reasoned, the scope of § 602 was limited to effectuating rights already created by § 601. Id. at 1521. The Supreme Court noted that § 602 focused on the role of federal regulatory agencies, rather than those benefitting from the statute's protection or the funding recipients regulated, making it an unlikely place to set forth a new private right of action. Id. Finally, it found that the specific inclusion of other enforcement mechanisms within the text of § 602, such as the termination of federal funding for covered institutions, contradicted the notion that Congress intended to create a private right of action since "[t]he express provision of one method of enforcing a substantive rule suggests that Congress meant to preclude others." Id. at 1521-1522. The Supreme Court concluded that it found "no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602." Id. at 1522.

The case at bar presents a situation analogous to that in Sandoval, starting with the similarities between the text and structure of the statutes. In fact, Title IX was patterned after Title VI. Cannon, 441 U.S. at 696. Title IX contains a rights-creating provision, § 901, that parallels Title VI's § 601. The provision establishes that "[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity" covered. 20 U.S.C. § 1681 (emphasis added). Title IX also includes § 902, a provision functionally identical to Title VI's § 602, that authorizes federal agencies to effectuate the terms of the statute. That provision states that: "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity ... is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability...." 20 U.S.C. § 1682. Pursuant to § 902, regulations promulgated by the Department of Justice pertaining to Title VI were incorporated by the Department of Education into Title IX. See 34 C.F.R. § 106.7. One such regulation bars recipients of federal funding from retaliating against persons who complain of discrimination prohibited by Title IX. See 34 C.F.R. § 100.7(e).[6] In Count III of her complaint, Plaintiff asserts a private right of action to enforce the regulatory prohibition on retaliation against the College. Defendants contend that such a private right of action does not exist.

[6] In addition to their argument based upon Sandoval, Defendants also argue that the relevant regulation, 34 C.F.R. 100.7(e), has not been incorporated into Title IX, and, even if it has been, is invalid as applied to Title IX because it is beyond that statute's scope. For the purposes of this analysis, as the Supreme Court did in Sandoval, this Court assumes that this regulation has been properly incorporated into Title IX, and that it is a valid regulation as applied to that statute. The Court need not decide these issues because it concludes that no private cause of action is available to assert a retaliation claim under Title IX.

As instructed by Sandoval, then, this Court examines the text and structure of Title IX for evidence of legislative intent to create a private right to enforce the anti-retaliation regulation. The Court does so while keeping in mind that Congress intended that Title IX was to be interpreted and enforced in the same manner as Title VI. Cannon, 441 U.S. at 696.[7] First, Title IX's § 902 contains no rights-creating language (in contrast to § 901), just as Title VI's § 602 contains no rights-creating language (in contrast to § 601). Second, § 902, like § 602, focuses on neither those benefitting from the statute's protection, nor the funding recipients regulated, but the agencies that will do the regulating – an unusual place for the legislature to create a new private right of action. Finally, the same alternative enforcement mechanisms specifically provided for in § 902 (and § 602), such as the termination of federal funding for covered institutions, do not support the idea that Congress intended to create the additional enforcement mechanism of a private right of action. Like Sandoval, there is no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce the anti-retaliation regulation promulgated under § 902. That the statute here is Title IX, and not Title VI, and that the regulation at issue prohibits retaliation instead of disparate impact discrimination, are distinctions that make no difference to this conclusion.

To this Court's knowledge, only one other court has been urged to apply the reasoning in Sandoval to prohibit a private cause of action for retaliation under Title IX. In Litman v. George Mason Univ., 156 F. Supp.2d 579 (E.D. Va. 2001), the court interpreted Sandoval as controlling due to the parallels between the statutes and held that no private cause of

[7] That the statutes were intended to be interpreted and enforced in the same manner is underscored, as noted supra, by the fact that the regulation prohibiting retaliation at issue here – 34 C.F.R. § 100.7(e) – was originally issued under Title VI and later incorporated into Title IX, as well as by the Supreme Court's application of Cannon, a Title IX case, to Title VI in Sandoval. Sandoval, 121 S. Ct. at 1516.

action existed for a Title IX retaliation claim. Id. at 586-587. The Court dismissed the count of the complaint alleging retaliation under Title IX. Id.

In an attempt to defeat dismissal of this count, Plaintiff attempts to distinguish Sandoval from the case at bar in a few ways. First, Plaintiff claims that, unlike in Sandoval, the anti-retaliation regulation in this case does not proscribe conduct *that is otherwise lawful* under § 901. Put another way, Plaintiff attempts to undermine the applicability of Sandoval by asserting that the Supreme Court's second key assumption to that decision – that § 601 did not bar the disparate impact discrimination proscribed by the regulations – is inoperable here, because § 901 *does* prohibit retaliation. However, on its face, § 901 does not refer to retaliation or describe conduct constituting retaliation. Furthermore, Plaintiff cites no evidence whatsoever based on the *text or structure of § 901* to support this contention. Instead, Plaintiff simply cites caselaw for the general proposition that "the prohibition against retaliation is intended to vindicate the antidiscrimination principle of Title IX."[8] This assertion, regardless of its veracity, does not constitute evidence that Congress specifically intended to prohibit retaliation in § 901.[9]

Second, Plaintiff argues that "the anti-retaliation regulation addresses intentional conduct (unlike the disparate impact regulation in Sandoval), and does not run afoul of Title IX's

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[8] Lowrey v. Texas A&M Univ. Sys., 117 F.3d 242, 248 n.6 (5th Cir. 1997).

[9] In Litman, the court also rejected a series of textually-based arguments that a private right of action to enforce Title IX's anti-retaliation regulation exists because § 901 itself prohibits retaliation. The plaintiff in that case argued that § 901's prohibition on "discrimination" included retaliation because, under *Title VII*, retaliation is defined as a form of discrimination. Litman, 156 F. Supp.2d at 583-585. However, in Litman the court dismissed such an interpretation as unwarranted because the "statutory prohibitions and administrative schemes" of Titles VII and Title IX are so markedly different, particularly in that Congress specifically included a prohibition on retaliation in Title VII, and declined to do so in Title IX. Id. at 583-586. The Court also ruled out any plain reading of "discrimination" to include "retaliation," reasoning that gender discrimination under Title IX – i.e., discrimination "on the basis of sex" – is fundamentally different from retaliation, which results from actions taken in response to discrimination. Id. at 585. Plaintiff has not advanced these arguments in this case, and as such this Court does not address them, except to note that the reasoning of the Litman court is persuasive.

designated purpose of protecting individuals from discrimination." However, in Sandoval, that the conduct prohibited by regulation was unintentional was in and of itself not significant, except insofar as the Court concluded that unintentional – or disparate impact – discrimination is not prohibited by Title VI itself. Similarly, as described above, Plaintiff has not provided any evidence from the text or structure of the statute that Congress meant to prohibit *retaliation* under *Title IX*, even though that conduct is intentional. In addition, the Court in Sandoval did not assume that the disparate impact regulations ran afoul of the statute's purpose, but simply that the regulations prohibited conduct which the legislation itself did not.

Instead of applying Sandoval, Plaintiff urges this Court to follow the conclusion of the Fifth Circuit in Lowrey v. Texas A&M Univ. Sys., 117 F.3d 242 (5th Cir. 1997). Lowrey is, admittedly, right on point. In that case, the court held that a private right of action exists for a retaliation claim under Title IX. In doing so, it applied the test established by the Supreme Court in Cort v. Ash, 422 U.S. 66 (1975), and considered four factors to determine whether a private right of action existed: (1) whether plaintiffs are among the class of persons intended to benefit from the enactment of the statute; (2) whether there is any evidence of legislative intent to provide or deny a private remedy; (3) whether a private remedy would be consistent with the underlying purposes of the legislative scheme; and (4) whether the action is one traditionally delegated to state law to the extent that it would be inappropriate to imply a federal remedy. Lowrey, 117 F.3d at 250.

However, this Court declines to follow Lowrey, which is not binding precedent upon it, because Lowrey was decided well *before* Sandoval and is ultimately incompatible with Sandoval in a number of ways. First, the applicability of the multi-pronged version of the Cort

test to these circumstances is in question. Since deciding Cort, the Supreme Court has shifted its analysis and has focused solely on the question of whether Congress *intended* to create private rights of action. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted...."); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) ("Our task is limited solely to determining whether Congress intended to create the private right of action asserted."). As a result, it appears the other Cort factors are relevant only insofar as they assist in determining congressional intent. See Touche Ross, 442 U.S. at 575-76. In any case, in Sandoval, the Supreme Court found it unnecessary to apply the Cort test as such – even though it similarly sought to determine whether a private right of action existed under Title IX's veritable twin – and instead limited its inquiry to congressional intent. This Court will follow Sandoval in this regard.

Second, even the specific analysis of legislative intent conduced by the Lowrey court is incompatible with the teachings of the Supreme Court in Sandoval. For example, the Fifth Circuit "[began] its analysis with the plain language of the *regulations*, " Lowrey, 117 F.3d at 250 (emphasis added), and concluded that the retaliation regulation could, by itself, give rise to an implied cause of action. Id. at 253. This analysis is plainly inconsistent with the Supreme Court's command that "private rights of action ... must be created by *Congress*. The judicial task is to interpret the *statute* Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Sandoval, 121 S. Ct. at 1519-1520 (emphasis added) (citations omitted). In Sandoval, the Court did not consider Title VI's disparate impact regulations themselves as evidence of congressional intent to create a private right of action to

enforce them. In fact, the Court flatly rejected that argument. "Language in a regulation may invoke a private right of action that Congress, through statutory text created, but it may not create a right that Congress has not." Id. at 1522. Again, this Court will adhere to Sandoval.

Plaintiff also cites to a host of additional cases which have, at least implicitly, found that a private cause of action exists to enforce Title IX's anti-retaliation regulation, but these cases are also not persuasive.[10] Like Lowrey, allthese cases were decided *before* Sandoval. In addition, one such decision, Preston v. Virginia ex. rel. New River Community College, 31 F.3d 203 (4th Cir. 1994), was apparently not followed on this point by the Litman court – the only other court to apply Sandoval to this precise question.

Plaintiff also seeks support for her position in Third Circuit precedent. Although the Third Circuit has not addressed the specific question at hand, Plaintiff contends that under Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939 (3d Cir. 1985), a private right of action exists to enforce the anti-retaliation regulation at issue. In Angelastro, the court construed the Securities and Exchange Act of 1934 and two rules promulgated under it by the Securities and Exchange Commission. Therefore, the statutory and regulatory schemes at issue in that case are not particularly analogous to the case at bar. Nevertheless, in Angelastro, the Third Circuit set out a general three-part test to decide whether to imply a private right of action from a statute and an agency rule or regulation promulgated thereunder. First, the court instructed, (1) a

[10] See, e.g., Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248-249 (2d Cir. 1995); Preston v. Virginia ex. rel. New River Community College, 31 F.3d 203, 205-206 n.2 (4th Cir. 1994); Adams v. Christian Bros. Univ., No. 97-C-3413, 1999 U.S. Dist. Lexis 3413, at *13-15 (N.D. Ill. Mar. 11, 1999); Linson v. University of Penn., No. 95-3681, 1996 U.S. Dist. Lexis 12243, at *14-15 (E.D. Pa. Aug. 21, 1996); Nelson v. University of Maine, 923 F. Supp. 275, 278 (D. Me. 1996); Clay v. Board of Trustees of Neosho County Community College, 905 F. Supp. 1488, 1493-1495 (D. Kan. 1995); Bowers v. Baylor Univ., 862 F. Supp. 142, 145 (W.D. Tex. 1994); Clemes v. Del Norte County Unified Sch. Dist., 843 F. Supp. 583, 588-590 (N.D. Cal. 1994).

determination should be made as to whether Congress intended the statute to be enforced by private actions by using the test set out in Cort and its progeny. Id. at 947. If Congress did not so intend, then the inquiry is concluded. However, if Congress did intend to enforce the statute with private rights of action, then two additional determinations must be made before a private right of action may be recognized: (2) whether the relevant agency rule is properly within the scope of the enabling statute, and (3) whether implying a private right of action will further the purpose of the enabling statute. Id. In answering these last two questions, the court indicated that it is *inappropriate* to consider legislative intent, which is the focus of the first prong. Id.

Applying the Angelastro test to this case in light of Sandoval, it is evident that Plaintiff cannot satisfy the first (or legislative intent) prong. For all the reasons described supra, there is no evidence of congressional intent to create the private right of action she urges upon the Court. Therefore, the Court need not consider the second and third prongs of the Angelastro test. An examination of Sandoval's impact on the Third Circuit's reasoning when it applied the Angelastro test *prior* to Sandoval in a very similar situation to the case at bar illustrates why – at least post-Sandoval – plaintiff fails the first prong.

Before Sandoval, the Third Circuit used the Angelastro test to recognize a private cause of action to enforce disparate impact regulations enacted under Title VI. See Powell v. Ridge, 189 F.3d 387 (3d Cir.), cert. denied, 528 U.S. 1046 (1999). In Powell, the court reasoned that the first Angelastro prong was satisfied because (1) the regulation at issue, although promulgated under § 602 of Title VI, implemented § 601; and (2) Supreme Court precedent established that a private right of action existed to enforce § 601. Id. at 399. However, at least to the extent Powell held that a private right of action *is* available to enforce disparate impact

regulations promulgated under Title VI, Sandoval overruled Powell. See South Camden Citizens in Action v. New Jersey Dep't of Envtl. Protection, 274 F.3d 771, 777-778 (2001). In light of several of the key legal principles set forth in Sandoval, and subsequently recognized by the Third Circuit in South Camden, the reasoning that satisfied the first Angelastro prong in Powell cannot similarly satisfy the first prong in this case, after Sandoval.

In contrast to the reasoning in Powell, under Sandoval, legislative intent to create a private right of action cannot be demonstrated either through (1) implementing regulations, when the regulation effectively creates a right not found within the text of that statute, or (2) reference to a different private right of action which Congress *did* intend to create, as evidenced by the statutory text. Accordingly, in Sandoval, the Court held that a private right of action to enforce Title VI's disparate impact regulations does not exist because the power of § 602 is limited to effectuating the rights articulated in § 601, which do not include a prohibition on disparate impact discrimination. Furthermore, the Court declined to recognize such a private right despite acknowledging that a private cause of action does exist to enforce the rights in § 601.

The Third Circuit recognized these specific teachings in South Camden, in which it recently held that no private right of action exists under § 1983 to enforce disparate impact discrimination regulations under Title VI.[11] See South Camden, 274 F.3d at 788-791. Although the statute at issue here is Title IX, and not Title VI, and the regulation at issue prohibits retaliation instead of disparate impact discrimination, the impact of these legal principles is the

[11] In South Camden, the court did not apply the Angelastro test because plaintiffs in that case asserted a cause of action under § 1983, to which a different analysis applies. See South Camden, 274 F.3d 779-780.

same. The private right asserted by Plaintiff is not recognizable under the first prong of the Angelastro test after Sandoval because the requisite legislative intent to create it is absent. Therefore, the Court need not address prongs two and three of that test.

For these reasons, this Court concludes that, in the wake of Sandoval, there is no private right of action under Title IX to enforce the anti-retaliation regulation that is the basis for Count III. Therefore, Defendants' Motion is granted as to Count III, and Count III of the complaint is dismissed against the College. For the additional reasons as explained in note 3 supra, Defendants' Motion is granted as to Count III of the complaint against Rothkopf as well.

D. Count IV - Breach of Contract

Finally, Defendants argue that Count IV must be dismissed against Rotkkopf because they allege, like Counts I and III, there is no legal basis whatsoever for liability against him personally. See supra notes 2 and 3. Indeed, Rothkopf was not a party to the alleged contract at issue and did not agree to any liability under it. Again, Plaintiff states that she does not oppose such dismissal. Therefore, the Court dismisses Count IV of the complaint against Rothkopf.

IV. CONCLUSION

Since Plaintiff does not object, Counts I, III and IV of the complaint are dismissed against Rothkopf. Because no private right of action exists to enforce a claim of retaliation under Title IX after Sandoval, Count III of the complaint is dismissed against the College as well. For the various other reasons stated above, the Motion is denied in all other respects. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EVE ATKINSON,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	No. 01-CV-2141
v.	:	
	:	
LAFAYETTE COLLEGE and	:	
ARTHUR J. ROTHKOPF, ESQUIRE,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 29th day of January 2002, upon consideration of Defendants Lafayette College and Arthur J. Rothkopf, Esquire's Motion for Partial Dismissal (Docket No. 4), Plaintiff Eve Atkinson's response thereto (Docket No. 6), and Defendants' Reply (Docket No. 7), it is hereby **ORDERED** that Defendants' Motion is **GRANTED** in part and **DENIED** in part.

More specifically, it is **ORDERED** that:

1. Defendants' Motion is **GRANTED** as to Count I of the complaint against Defendant Arthur J. Rothkopf, and Count I is **DISMISSED** against Rothkopf.
2. Defendants' Motion is **DENIED** as to Count I of the complaint against Defendant Lafayette College.
3. Defendants' Motion is **DENIED** as to Count II of the complaint against both Defendants Lafayette College and Arthur J. Rothkopf.
4. Defendants' Motion is **GRANTED** as to Count III of the complaint against both Defendants Lafayette College and Arthur J. Rothkopf, and Count III is

DISMISSED against both the College and Rothkopf.

5. Defendants' Motion is **GRANTED** as to Count IV of the complaint against Defendant Arthur J. Rothkopf, and Count IV is **DISMISSED** against Rothkopf.

BY THE COURT:

_____

RONALD L. BUCKWALTER, J.